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No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JAIRO JONATHAN ELIAS ZACARIAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

The Refugee Act of 1980 requires an alien seeking asylum to demonstrate "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42), 1158(a). The question presented is whether a guerrilla organization's attempt to coerce a person into performing military service necessarily constitutes persecution "on account of" that person's political opinion.

II

PARTIES TO THE PROCEEDING

The names of all parties appear in the caption of the case.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	22
Appendix A	1a
Appendix B	26a
Appendix C	27a
Appendix D	34a
Appendix E	37a
Appendix F	39a
Appendix G	43a

TABLE OF AUTHORITIES

Cases:

Alonzo v. *INS*, 915 F.2d 546 (9th Cir. 1990)	16, 17
Alvarez-Flores v. *INS*, 909 F.2d 1 (1st Cir. 1990)	14
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	11, 19, 20
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983)	21
Fort Stewart Schools v. *FLRA*, 110 S. Ct. 2043 (1990)	20
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	6, 11, 17, 18, 20, 21
INS v. *Stevic*, 467 U.S. 407 (1984)	6
M.A. A26851062 v. *INS*, 899 F.2d 304 (4th Cir. 1990)	20
Maldonado-Cruz, In re, Interim Dec. 3041 (B.I.A. 1988)	13
Maldonado-Cruz v. *INS*, 883 F.2d 788 (9th Cir. 1989)	7, 13
Massachusetts v. *Morash*, 490 U.S. 107 (1989)	20
Mendoza Perez v. *INS*, 902 F.2d 760 (9th Cir. 1990)	19

Cases—Continued: Page

Pension Benefit Guaranty Corp. v. *LTV Corp.*, 110 S. Ct. 2668 (1990) 20
Perlera-Escobar v. *Executive Office for Immigration*, 894 F.2d 1292 (11th Cir. 1990) 8, 9, 10, 11, 12, 13, 19, 20
Sullivan v. *Everhart*, 110 S. Ct. 960 (1990) 20
Umanzor-Alvarado v. *INS*, 896 F.2d 14 (1st Cir. 1990) 14
Vigil, In re, Interim Dec. 3050 (B.I.A. 1988) 13

Treaties, constitution, statutes, and regulation:

United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 152..... 18
United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. I, 19 U.S.T. 6225, T.I.A.S. No. 6577 18
International Refugee Organization Const., Annex 1, Pt. 1, 62 Stat. 3037:
§ A1(a)-(c), 62 Stat. 3049 18
§ A3, 62 Stat. 3049-3050 18
§ C1(a)(i), 62 Stat. 3050 18
Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 20
§ 302, 104 Stat. 5030 20
§ 302(b)(1)(A), 104 Stat. 5031 (8 U.S.C. 1254a) 21
§ 302(b)(2)(B), 104 Stat. 5032 21
Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*:
§ 101(a)(42), 8 U.S.C. 1101(a)(42) 2, 43a
§ 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A) ..2, 8, 14, 15, 43a
§ 208(a), 8 U.S.C. 1158(a) 2, 16, 44a
§ 209, 8 U.S.C. 1159 21
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 2
8 C.F.R. 208.13 16

Miscellaneous: Page

1988 Statistical Y.B. INS (Aug. 1989) 20
Note, *A Refugee By Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 Va. L. Rev. 681 (1989) 15
S. Conf. Rep. No. 590, 96th Cong., 2d Sess. (1980).. 18
S. Rep. No. 256, 96th Cong., 1st Sess. (1979) 18

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The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals, App., *infra*, 5a-25a, is reported at 921 F.2d 844. The initial opinion of the court of appeals is reported at 908 F.2d 1452. The opinion of the Board of Immigration Appeals denying respondent's motion to reopen his deportation proceeding, App., *infra*, 27a-33a, is unreported. The opinion of the Board of Immigration Appeals denying respondent's motion for reconsideration of its dismissal of respondent's appeal, App., *infra*, 34a-36a, is unreported. The opinion of the Board of Immigration Appeals dismissing respond-

ent's appeal, App., *infra*, 37a-38a, is unreported. The oral opinion of the Immigration Judge, App., *infra*, 39a-42a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1990. A petition for rehearing was denied on January 10, 1991. App., *infra*, 26a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Refugee Act of 1980, added to the Immigration and Nationality Act of 1952 as Sections 101(a)(42) and 208(a) and codified at 8 U.S.C. 1101(a)(42) and 1158(a), are reproduced at App., *infra*, 43a-44a.

STATEMENT

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, limits eligibility for asylum to any alien the Attorney General determines to be "a refugee within the meaning of section 1101(a)(42)(A) of this title." 8 U.S.C. 1158(a). A "refugee" is defined to be any person who is unwilling to return to his native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

Respondent Jairo Jonathan Elias Zacarias left his native Guatemala after two masked guerrillas armed with machine guns asked him to join their army and, when he declined to join, told him to "think it [over] well." App., *infra*, 6a-7a. In his deportation pro-

ceeding, respondent applied for asylum and withholding of deportation on the ground that the guerrillas' attempt to recruit him constituted persecution "on account of" his political opinion.

The Immigration Judge and the Board of Immigration Appeals denied the requested relief because the guerrillas did not threaten to harm respondent if he refused to join them, and because any implicit threat was not "on account of" his political opinion.

The Ninth Circuit reversed and found respondent eligible for asylum. It held that the Guatemalan guerrillas' practice of forcible recruitment made it reasonable for respondent to take the admonition to "think it [over] well" as a threat. App., *infra*, 17a. Moreover, that threat was "properly categorized as 'on account of political opinion,' because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." *Id.* at 12a. On the basis of its conclusion that respondent was a "refugee" within the meaning of the 1980 Act, the court of appeals remanded for the BIA to determine whether respondent should be granted asylum. *Id.* at 25a.

1. Respondent is a nineteen-year-old man who left his native Guatemala in March 1987, a few months after two masked guerrillas came to his home. The guerrillas were armed with machine guns and asked respondent to join their army. Respondent refused to join, even though the guerrillas offered to pay him to fight for them. The guerrillas told respondent to "think it [over] well" and said that they would be back. Respondent remained at home and continued to work at his regular job for the next two months before he decided to leave Guatemala for the United States. App., *infra*, 6a-7a, 32a, 40a-41a; C.R. at 37.

monitor the state program to ensure that it continues to meet federal minimum standards (CWA § 402(c), 33 U.S.C. 1342(c)), and, after notification to the State, to enforce the terms of state-issued permits if the State has failed to institute enforcement actions of its own. CWA § 309(a), 33 U.S.C. 1319(a).

b. Two provisions in the CWA address federal amenability to suit. The State asserted in this litigation that each of those provisions constitutes an independent basis for claiming civil penalties against the federal government.

i. The federal facilities provision of the CWA, Section 313(a), 33 U.S.C. 1323(a), provides that federal facilities "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity * * *." Section 313(a) then adds that the above sentence "shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner."[2] Section 313(a) further provides, however, that "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court."

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[2] Section 313(a) also adds that "[t]his subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law."

According to the State, the above provision generally waives federal sovereign immunity from assessment of civil penalties for violation of state water pollution statutes, provided that the civil penalties meet the requirement of the proviso—*i.e.*, that they "aris[e] under Federal law." Under Ohio Rev. Code Ann. § 6111.09 (Anderson Supp. 1987), "[a]ny person who violates [state water pollution regulations] shall pay a civil penalty of not more than ten thousand dollars per day of violation, to be paid into the state treasury to the credit of the general revenue fund."[3] The State asserts that this civil penalty provision can be said to "arise under" federal law, since it is part of the EPA-approved Ohio permit program. The State argues that the CWA federal facilities provision therefore waives federal sovereign immunity from assessment of civil penalties payable to the state treasury under Ohio Rev. Code § 6111.09.

ii. In addition to the federal facilities provision, the CWA's citizen suit provision, Section 505(a), 33 U.S.C. 1365(a), also addresses federal amenability to suit. See generally *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). Under Section 505(a), "any citizen may commence a civil action * * * against any person (including * * * the United States)" to enforce an effluent standard or limitation," which is defined by CWA Section 505(f), 33 U.S.C. 1365(f), to include

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[3] All references to Ohio Rev. Code § 6111.09 and to the penalty provision of the state hazardous waste act, Ohio Rev. Code § 3734.13(C), are to those provisions as they were when this lawsuit was filed. Although both provisions have since been amended, the changes are not significant for purposes of this case.

an NPDES permit, whether issued under federal or state law. The citizen suit provision thus includes the federal government among those entities that can be defendants in CWA citizen suits. Section 505(a) further provides that district courts shall have jurisdiction in such citizen suits to require compliance with an NPDES permit and to apply "any appropriate civil penalties" under the CWA's civil penalties provision, Section 309(d), 33 U.S.C. 1319(d). Section 309(d) itself provides for civil penalties payable to the United States for violations by any "person"—a term defined in CWA Section 502(5), 33 U.S.C. 1362(5), to refer to a list of entities that does not include the federal government.

The State asserts that CWA civil penalties against the federal government are "appropriate" under the citizen suit provision. CWA civil penalties may range up to $25,000 per day for each violation. CWA § 309(d), 33 U.S.C. 1319(d). Like any federal civil penalties and unlike the state penalties sought under the CWA's federal facilities provision, such federal civil penalties must be deposited into the federal treasury. See 31 U.S.C. 3302(b).

2. a. Originally enacted on October 21, 1976, RCRA, 42 U.S.C. 6901 *et seq.*, was the first federal effort to address the problem of solid waste generally, and hazardous waste specifically. In Subtitle C, 42 U.S.C. 6921 *et seq.*, RCRA creates a "cradle-to-grave" management system intended to ensure that hazardous wastes are safely treated, stored, and disposed of. Section 3004 of RCRA requires EPA to promulgate regulations establishing performance standards applicable to owners and operators of new and existing

treatment, storage, or disposal facilities as may be necessary to protect health and the environment. 42 U.S.C. 6924.

RCRA's permit system is administered in relevant respects much like that created by the CWA. Section 3005 of RCRA requires any facility that treats, stores, or disposes of hazardous waste to obtain a permit. 42 U.S.C. 6925. Section 3005(c) authorizes EPA or a State to issue such a permit only upon determining that the facility is in compliance with the standards promulgated by EPA under Section 3004. The statute provides that a State may issue and enforce hazardous waste management permits after it has applied to EPA to administer a hazardous waste program "in lieu of the Federal program," and EPA has authorized the program on the ground that it "is equivalent to the Federal program" and provides "adequate enforcement" of RCRA's requirements. RCRA § 3006(b), 42 U.S.C. 6926(b). A State may obtain interim EPA authorization for its hazardous waste program if the program is found to be "substantially equivalent" to the federal program.[4] Even after an approved state program has begun to function, EPA generally retains authority to monitor the state program to ensure that it continues to meet federal minimum standards (RCRA § 3006(e), 42 U.S.C. 6926(e)) and to enforce the terms of state-issued permits after notifying the State if the State has failed to institute enforcement actions of its own. RCRA § 3008(a), 42 U.S.C. 6928(a).

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[4] Ohio received interim authorization for its program on (July 15, 1983). 48 Fed. Reg. 32,345 (1983). However, EPA withdrew that authorization on January 31, 1986. 51 Fed. Reg. 4128 (1986).

b. Two provisions in RCRA address federal amenability to suit for violation of hazardous waste regulations. As with the CWA, the State asserted in this litigation that each of those provisions constitutes an independent basis for claiming civil penalties against the federal government.

i. The federal facilities provision of RCRA, Section 6001, 42 U.S.C. 6961, contains somewhat different language from the corresponding CWA provision. RCRA Section 6001 provides that facilities operated by the federal government "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting the control and abatement of hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements."

The State asserts that this provision simply waives federal sovereign immunity from assessment of civil penalties for hazardous waste violations, with no requirement that such civil penalties must "aris[e] under Federal law," as in the CWA. Ohio Rev. Code § 3734.13(C) provides that the state attorney general may bring an action for any violation of the state hazardous waste statutes and that in such an action "[t]he court may impose * * * a civil penalty of not more than ten thousand dollars for each day of each violation. * * * Moneys resulting from civil penalties imposed under [this provision] shall be paid into the hazardous waste clean-up fund" created elsewhere in the statute. 1985 Ohio Laws 2295. Therefore, the State argues, the RCRA federal facilities provision waives federal sovereign immunity from assessment

of civil penalties payable to the state hazardous waste clean-up fund under Ohio Rev. Code § 3734.13.

ii. RCRA's citizen suit and civil penalties provisions are very similar to the corresponding CWA provisions. Under RCRA's citizen suit provision, Section 7002(a), 42 U.S.C. 6972(a), "any person may commence a civil action * * * against any person (including * * * the United States * * *)" to enforce a "permit, standard, regulation, condition, requirement, prohibition, or order" under RCRA. Section 7002(a) further provides that district courts shall have jurisdiction in such citizen suits to require compliance with RCRA and to apply "any appropriate civil penalties" under RCRA's civil penalties provision, Section 3008(g), 42 U.S.C. 6928(g). Section 3008(g) itself provides for civil penalties payable "to the United States" for violations by any "person" —a term defined in RCRA Section 1004(15), 42 U.S.C. 6903(15), to refer to a list of entities that does not include the federal government.

The State asserts that civil penalties against the federal government are "appropriate" under the citizen suit provision. Such civil penalties may range up to $25,000 per day for each violation. RCRA § 3008(g), 42 U.S.C. 6928(g).

3. In this case, the State of Ohio filed suit in federal district court against DOE, the Secretary of Energy, and DOE's former private contractor, alleging that defendants had improperly treated, stored, and disposed of hazardous wastes and had improperly discharged pollutants and contaminants into waters at DOE's uranium processing plant in Fernald, Ohio. The State, relying on RCRA, the CWA, and state environmental laws, sought, *inter alia*, injunctive re-

lief and civil penalties against DOE under both state and federal law.[5]

In the district court, the United States moved to dismiss all claims for civil penalties as barred by the federal government's sovereign immunity. The court denied the motion, holding that federal sovereign immunity was waived under RCRA and the CWA as to both federal and state penalties. *Ohio* v. *United States Dep't of Energy*, 689 F. Supp. 760 (S.D. Ohio 1988). The parties subsequently entered into a consent decree settling the injunctive relief claims. See App., *infra*, 29a. C.A. App. 106-136. As part of the overall settlement, the parties stipulated (C.A. App. 137-142) to the amount of civil penalties to be paid—a potential total of $125,000 for water pollution violations and $125,000 for hazardous waste violations—if the United States does not prevail on appeal.

The district court certified (C.A. App. 105) an interlocutory appeal of the civil penalties issue under 28 U.S.C. 1292(b), and the Sixth Circuit granted the unopposed petition of the United States for permission to appeal. C.A. App. 157.

4. A divided panel of the Sixth Circuit affirmed the district court in part, holding that the federal facilities provision of the CWA does waive federal sovereign immunity from civil penalties assessed under Ohio Rev. Code § 6111.09 and payable to the state treasury, that the federal facilities provision of RCRA does not waive federal sovereign immunity

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[5] The State's complaint also contained two claims based on the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* Pursuant to the settlement agreement between the parties discussed below, one of the CERCLA claims was dismissed and the other was stayed. App., *infra*, 29a; C.A. App. 127.

from civil penalties under Ohio Rev. Code § 3734.13 (C), and that the citizen suit provision of RCRA does waive federal sovereign immunity from civil penalties payable to the federal treasury under RCRA's own civil penalties provision. The court did not reach the State's contention that the citizen suit provision of the CWA, like the citizen suit provision of RCRA, waives federal sovereign immunity from civil penalties under federal law.[6]

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[6] The court of appeals held that it "need not consider" the State's "alternative argument" based on the CWA's citizen suit provision, (App., *infra*, 8a), although the district court had reached that issue and held that the CWA citizen suit provision waived federal sovereign immunity from civil penalties assessed under the CWA itself (App., *infra*, 42a-43a). Although the court of appeals did not elaborate on its reasons for not reaching this issue, the stipulation between the parties deprived the controversy over federal penalties of any significance once the court of appeals had decided that the federal government was liable for civil penalties under state law. The stipulation provided for payment of a maximum of $125,000 in CWA civil penalties under either state or federal law. C.A. App. 139. It also expressly provided for payment in that amount to the state treasury if state penalties were held permissible (C.A. App. 140-141), and to the federal treasury if state penalties were held impermissible but federal penalties were held permissible (C.A. App. 141). Thus, once it was determined that state penalties were permissible, the stipulation rendered it unnecessary to consider whether federal penalties were permissible as well. We note, however, that the RCRA citizen suit and penalty provisions are quite similar in relevant respects to those of the CWA. Accordingly, resolution of the question whether the RCRA citizen suit provision waives federal sovereign immunity from civil penalties (the second question presented in this petition) would provide substantial guidance in resolving the corresponding issue under the CWA.

a. With respect to the CWA, the court found that sovereign immunity was waived by Section 313 for penalties "arising under federal law." App., *infra*, 4a-6a. The court then addressed the question whether immunity for civil penalties under Ohio Rev. Code § 6111.09 was waived and found that immunity from such state civil penalties was waived because they "arise under" federal law. The panel reasoned (App., *infra*, 7a):

> Once a state water pollution law is approved, compliance with the state law *is* compliance with the Clean Water Act. 33 U.S.C. § 1342(k). Thus, under the terms of the Clean Water Act, a qualifying state water pollution law, including its civil penalties, arises under federal law.

Judge Guy dissented as to the panel's holdings concerning both the CWA and RCRA. App., *infra*, 16a-27a. With respect to the CWA, he agreed with the majority (App., *infra*, 19a-20a) that the federal facilities provision of the CWA, Section 313(a), waives sovereign immunity for civil penalties arising under federal—but not state—law. However, in determining which civil penalties arise under federal law, Judge Guy agreed with the Ninth Circuit's decision in *California* v. *Department of the Navy*, 845 F.2d 222 (1988), that a state's EPA-approved permit program and penalties assessed thereunder do not "arise under Federal law." App., *infra*, 22a-24a. He based this conclusion on the explicit statutory recognition that a state "administer[s] *its own* permit program * * * upon approval of the program by [the] EPA." App., *infra*, 22a (quoting 33 U.S.C. 1342(b) (emphasis supplied)). He also relied on statements in the statute's legislative history that state permit programs "function[] in lieu of the Federal pro-

gram." App., *infra*, 23a (quoting H.R. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977)).

b. With respect to RCRA, the court unanimously rejected the district court's conclusion that the federal facilities provision waives the federal government's sovereign immunity from state or federal civil penalties. App., *infra*, 9a-12a, 17a n.1 (Guy, J., dissenting). The court held that Congress did not waive sovereign immunity from state or federal civil penalties under the federal facilities provision of the Act, RCRA Section 6001, 42 U.S.C. 6961, because, unlike the CWA, RCRA does not specifically mention "sanctions" in its waiver provision. The court also observed that although RCRA Section 6001, 42 U.S.C. 6961, explicitly discusses injunctive relief twice, it never mentions monetary relief or civil penalties. In holding that any waiver of sovereign immunity from civil penalties in Section 6001 "is not stated clearly enough to be recognized" (App., *infra*, 10a), the Sixth Circuit agreed with the Ninth Circuit in *United States* v. *Washington*, 872 F.2d 874 (1989), and the Tenth Circuit in *Mitzelfelt* v. *Department of Air Force*, 903 F.2d 1293 (1990).

The panel majority did, however, find that RCRA's citizen suit provision constituted a waiver of federal immunity from civil penalties assessed under RCRA's own civil penalties provision.[7] The majority stated (App., *infra*, 15a) that the "fairest reading" of RCRA Section 7002, 42 U.S.C. 6972, subjects the United States to the application of "appropriate"

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[7] In *Washington*, the Ninth Circuit declined to rule on whether the citizen suit provision of RCRA constituted a waiver of sovereign immunity, explaining that the issue was not properly before the court. 872 F.2d at 880-881. The issue also was not raised or decided in *Mitzelfelt*.

civil penalties because it generally authorizes suits against the United States. The court rejected (App., *infra*, 14a-15a) the United States' argument that, although civil penalties are "appropriate" against other entities, they are never "appropriate" when levied against the federal government. In addition, the majority stated, RCRA's legislative history demonstrates that Congress intended to subject the United States to civil penalties in citizen suits. *Id.* at 15a-16a.

Judge Guy disagreed with the majority's conclusion that the citizen suit provision of RCRA authorizes civil penalties against the United States. Judge Guy found that, under the citizen suit provision's express language, "judicial authority to impose civil penalties in response to RCRA citizen suits is limited to sanctions permitted under 42 U.S.C. §§ 6928(a) and (g)." App., *infra*, 25a. Because the United States is excluded from RCRA's general definition of "person[s]" against whom civil penalties may be levied under those Sections, the reference in the citizen suit provision to those Sections precludes assessment of civil penalties against the United States. App., *infra*, 25a-26a. He also noted that the exclusion of the United States from those entities subject to civil penalties is "entirely logical" because the penalties assessed under RCRA are payable "to the United States." App., *infra*, 26a n.4 (quoting 42 U.S.C. 6928(g)). He concluded that RCRA waives sovereign immunity only to the extent that it permits states to seek declaratory and injunctive relief. App., *infra*, 26a.

REASONS FOR GRANTING THE PETITION

1. Under settled legal principles, a waiver of sovereign immunity by the federal government must be unequivocally expressed and may not be implied, assumed, or based on speculation or ambiguity. *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *King*, 395 U.S. 1, 4 (1969). Any asserted waiver of the United States' immunity to suit—especially in matters affecting the federal fisc, see *Lehman* v. *Nakshian*, 453 U.S. 156, 161 & n.8 (1981)—must be construed "strictly in favor of the sovereign" and "not enlarge[d] * * * beyond what the language requires." *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986) (citation omitted); accord *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). As in other contexts, asserted waivers of sovereign immunity in federal environmental statutes must be "clear and unambiguous." *Hancock* v. *Train*, 426 U.S. 167, 179 (1976); *EPA* v. *California*, 426 U.S. 200, 211 (1976).

In *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554 (1921), the Court held that a statute waiving sovereign immunity in terms similar to those in the CWA and RCRA was insufficient to waive federal immunity to fines and penalties. The statute at issue provided that rail carriers "while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law." 256 U.S. at 558. Justice Brandeis, writing for a unanimous Court, noted that "the element of punishment clearly predominates" with respect to the penalties sought (256 U.S. at 565) and consequently held that—notwithstanding the general terms used in the statute—"Congress has not

given its consent that suits of this character be brought against the United States." *Ibid.*

2. The Sixth Circuit departed from these settled principles in holding that Congress has waived federal sovereign immunity from civil penalties payable to the State in the CWA and has waived federal sovereign immunity from payment of civil penalties to the federal treasury in RCRA. The Sixth Circuit's decision with respect to the CWA directly conflicts with the decision of the Ninth Circuit in *California* v. *Department of the Navy*, 845 F.2d 222 (1988), thus creating an inconsistent regime in which the ability of a State to obtain civil penalties from the federal government depends on the accident of its location. Such inconsistency has the potential to skew incentives for both the States and the federal government. It can encourage efforts by "favored" States to obtain federal funds through civil penalties not available to other States. At the same time, it will tend to press the federal government to direct resources available for environmental clean-up efforts to sites in States with the greatest potential threat of civil penalties, rather than to those sites that most urgently require action.

The Sixth Circuit similarly erred in holding that, although Congress did not waive federal sovereign immunity from civil penalties in the RCRA provision that specifically addresses federal facilities, it did do so—at least as to penalties assessed under federal law—in the provision generally authorizing citizen suits against public or private entities. That holding once again departs from settled legal principles requiring narrow construction of waivers of sovereign immunity. Although no other court of appeals has addressed the particular question whether the RCRA

citizen suit provision constitutes a waiver of sovereign immunity from civil penalties, the Sixth Circuit's result differs from the result reached by the Ninth and Tenth Circuit in holdings that civil penalties are not available under the federal facilities provision of RCRA. Moreover, the Sixth Circuit's holding that the federal government must pay civil penalties to itself is illogical and unsupported by RCRA's legislative history. As with the CWA, adding civil penalties to the concededly proper injunctive remedies that Congress has authorized threatens to impede the federal government's ability to advance environmental compliance and cleanup efforts in a rational manner by allocating resources on the basis of environmental needs, rather than on the basis of which state has the most active litigants.

In short, this case presents closely related issues that arise under similar, but not identical, federal environmental statutes.[8] The amenability of the federal government to civil penalties under both statutes has been extensively litigated in the lower federal courts, resulting in a direct circuit conflict with respect to the CWA and a disparate array of district court decisions with respect to both statutes. The court of appeals erred in failing to recognize that the language of both statutes most reasonably can—and therefore, in light of settled principles of sovereign immunity, should—be read to reflect a congressional intent to subject the federal government to judicial enforcement of the statutes by means of prospective,

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[8] In addition, provisions that correspond to the citizen suit and federal facilities provisions of the CWA and RCRA can be found in the Safe Drinking Water Act, 42 U.S.C. 300j-8 (citizen suit), 42 U.S.C. 300j-6 (federal facilities), and the Clean Air Act, 42 U.S.C. 7604(a) (citizen suit), 42 U.S.C. 7418(a) (federal facilities).

injunctive relief, but not to penalize the federal government by imposition of civil penalties for past failures. Because both the federal government and the States have a substantial interest in uniform nationwide standards governing federal liability for civil penalties in environmental litigation, review of the Sixth Circuit's decision by this Court is warranted.

3. *CWA.* The court of appeals made two distinct errors in concluding that the federal facilities provision of the CWA waives federal sovereign immunity from state-law civil penalties. First, the court began its analysis by mistakenly holding that the federal facilities provision, which concededly waives federal sovereign immunity for some purposes, supplies a sufficiently clear waiver of federal sovereign immunity *from civil penalties.* Second, the court compounded its error by holding, in square conflict with *California* v. *Department of the Navy*, 845 F.2d 222 (9th Cir. 1988), that "practically speaking, actions under a qualifying state water pollution law arise under federal law" (App., *infra*, 7a) and therefore satisfy the "arising under Federal law" requirement of the federal facilities provision.

a. Section 313(a) of the CWA does not in "clear and unambiguous" (*Hancock* v *Train*, 426 U.S. at 179) terms waive the federal government's sovereign immunity from civil penalties. The first sentence of the provision refers to three types of regulation to which federal facilities are subject: "all * * * requirements," "administrative authority," and "process and sanctions." The second sentence elaborates on each of these categories, to make clear that "requirements" refers to "any requirement whether substantive or procedural"; that "administrative authority" includes such authority exercised by any level of government; and that "process and sanc-

tions" refers to "any process and sanction whether enforced in Federal, State, or local courts or in any other manner." Nowhere in this explication of the statute's terms is any mention made of either "civil penalties" or "penalties."

The court of appeals' interpretation of the above language blurs the three distinct statutory categories The court held that Section 313(a) subjects federal facilities to "'any requirement,' including 'sanctions,'"[9] and goes on to "specifically state[] that sovereign immunity is waived for *any* sanction." App, *infra*, 4a-5a. Yet the statute demonstrably does not include "sanctions" among "requirements"; the waiver as to "requirements" is in a threefold list that includes "sanctions" in a distinct and coordinate category. Furthermore, "sanctions" are not themselves a separate statutory category. Rather, the term "sanction" is used twice in the statute, each time coupled in the phrase "process and sanctions" (or "any process and sanction"). Thus, the clear import of the statutory language is that "process and sanctions" is a single category, coordinate to "requirements," as to which Congress intended to waive sovereign immunity.

Neither "requirements" nor "process and sanctions" are readily understood to include civil penalties. The term "all requirements" is most naturally read to refer to regulations that govern the primary conduct of those who operate federal facilities, not to civil or criminal penalties to be imposed when the federal facilities cannot or do not comply with those

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[9] The court later similarly asserted that the term "all requirements" includes "process and sanctions." App., *infra*, 6a.

requirements.[10] See *Mitzelfelt* v. *Department of Air Force*, 903 F.2d 1293, 1295 (10th Cir. 1990) (interpreting RCRA); *California* v. *Walters*, 751 F.2d 977, 978 (9th Cir. 1984) (same). Similarly, the term "process and sanctions" has a tolerably clear legal meaning, referring to judicial procedures and mechanisms by which courts protect their jurisdiction and compel compliance with equitable decrees. By waiving sovereign immunity for "process and sanctions" Congress clearly intended to subject federal facilities to judicial process, including sanctions to compel compliance with judicial process. There is no reason to believe, however, that Congress intended as well to take the extraordinary step of subjecting the federal government to civil penalties payable to a "subordinate sovereign" and decreed by that sovereign's laws. *Hancock* v. *Train*, 426 U.S. at 179. And, in any event, no such intent is unambiguously stated.

b. As the court of appeals correctly stated, the proviso to Section 313(a) "explicitly limits [Section 313(a)'s] waiver of sovereign immunity for civil penalties to those 'arising under federal law.'" App., *infra*, 6a.[11] In this case, the State of Ohio relied on

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[10] Indeed, on brief in the court of appeals, the State itself relied entirely on the "process and sanctions" clause of Section 313, not the "requirements" clause. Resp. C.A. Br. 18-25.

[11] The court of appeals relied on the proviso's apparent presupposition that some *other* language in the statute waives sovereign immunity from at least some civil penalties in holding that the "process and sanction" language accomplishes such a waiver. App., *infra*, 6a. Yet the proviso itself is at best a limitation on a waiver and not a waiver itself. As such, the proviso could not provide the kind of "clear and unambiguous" language that is otherwise absent from the express terms of the balance of Section 313(a).

a state statute, Ohio Rev. Code Ann. § 6111.09 (Anderson 1987), as authority for the imposition of civil penalties on the United States payable to the state treasury. Because civil penalties assessed under Ohio Rev. Code § 6111.09 do not in any sense arise under federal law, the Sixth Circuit's holding that Section 313(a) waives federal sovereign immunity as to such civil penalties is erroneous.

i. The court of appeals' holding is in direct conflict with the holding of the Ninth Circuit in *California* v. *Department of the Navy*, 845 F.2d 222, 225 (9th Cir. 1988).[12] In *California*, as here, the State sought to impose civil penalties pursuant to state law on a federal facility that had allegedly violated a state water pollution discharge permit. 845 F.2d at 223. As in this case, the state permit program had been approved by the EPA, and the State pointed out that such approval is conditioned in part on a showing that the State had adequate authority "to abate violations of the permit program, including civil and criminal penalties" under CWA Section 402(b)(7), 33 U.S.C. 1342(b)(7). See 845 F.2d at 225. As here, the State argued that, in light of the EPA approval, the state civil penalty provisions could be said to arise under federal law for purposes of the Section 313(a) proviso.

The Ninth Circuit squarely rejected the State's argument as "neither supported by the structure of the CWA nor its legislative history." 845 F.2d at 225. The court noted that the language of the CWA itself

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[12] See also *McClellan Ecological Seepage Situation (MESS)* v. *Weinberger*, 655 F. Supp. 601, 604-605 (E.D. Cal. 1986) (no waiver of sovereign immunity from state civil penalties); but cf. *Metropolitan Sanitary Dist.* v. *Navy*, 722 F. Supp. 1565, 1571-1572 (1989), on reconsideration, 737 F. Supp. 51 (N.D. Ill. 1990).

refers to the fact that an approved state permit program is administered under state law. 845 F.2d at 225. For example, CWA § 402(b), 33 U.S.C. 1342(b), requires a State seeking EPA approval of a state permit program to submit "a full and complete description of the program it proposes to establish and administer *under State law*" (emphasis added).[13] The Ninth Circuit also noted that the CWA's legislative history "clearly states that state permit programs are 'not a delegation of Federal authority,' but instead are state programs which 'function[] in lieu of the Federal program." 845 F.2d at 225 (quoting H.R. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977).[14] Because the State's argument would "essentially nullify § 313(a)'s express limitation of civil penalties against federal agencies to those arising under federal law" (845 F.2d at 225), the Ninth Circuit "decline[d] the invitation to find a Congressional waiver of sovereign immunity without finding the requisite explicit Congressional intent." *Ibid.* In arriving at its contrary conclusion,

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[13] Section 402(b) also requires a state seeking to run its own permit program to demonstrate to the EPA "that the laws *of such state* * * * provide adequate authority to carry out the described program." 33 U.S.C. 1342(b) (emphasis added). See also CWA § 101(b), 33 U.S.C. 1251(b) (recognition that states retain "primary responsibilities * * * to prevent, reduce, and eliminate pollution").

[14] See also 118 Cong. Rec. 33,761 (1972) (Rep. Wright) (stating that, if EPA approves state program, state may issue permits "under State law" and that such permits would be "State, not Federal actions"); H.R. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977) (emphasizing that state permits are issued "under state law," and that an EPA-approved state program "functions in lieu of the Federal program" and "does not involve a delegation of Federal authority").

the majority in this case did not mention or attempt to distinguish the Ninth Circuit's decision in *California* v. *Department of the Navy*.[15]

ii. The Sixth Circuit's holding that civil penalties assessed under state law arise under federal law is mistaken. The complaint in this case sought an order that the United States shall "pursuant to Ohio Revised Code Section 6111.09 * * * pay into the [Ohio] treasury a civil penalty for each violation of Ohio Revised Code Chapter 6111." C.A. App. 52. Moreover, the section of the complaint entitled "Jurisdiction" alleged that "[t]he Court has pendent jurisdiction over the claims asserted under the laws of the State of Ohio." C.A. App. 10.[16] These allegations reflected the State's own recognition that the state civil penalties at issue arise under state law.[17]

Moreover, the law governing the assessment of civil penalties in this case is entirely state law. The question whether penalties should be assessed and, if so, in what amount and to whom they are to be paid are solely questions of state law.[18] Cf. *Smith* v.

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[15] Judge Guy's dissenting opinion did cite *California* v. *Department of the Navy*. See App., *infra*, 23a-24a.

[16] See also Resp. C.A. Br. 26 (Water pollution counts in the complaint "contain pendent state claims for civil penalties under Ohio Revised Code Section 6111.09.").

[17] Indeed, by invoking pendent jurisdiction for its state-law penalty claims, the State apparently indicated its belief that there was no independent basis for federal jurisdiction over such claims—*i.e.*, unlike the claims for federal civil penalties, the claims for state civil penalties do not "aris[e] under" federal law. 28 U.S.C. 1331.

[18] To be sure, Ohio may choose to borrow federal standards for assessing civil penalties under CWA 309(d), 33 U.S.C. 1319(d), to govern some of these issues. See, *e.g.*, *State* v. *Dayton Malleable, Inc.*, 1 Ohio St. 3d 151, 157, 438 N.E.2d

Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921); see also *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action."). Because the Ohio legislature, not the United States Congress, enacted the statute that creates the right to civil penalties at issue here, that right arises under Ohio, not federal, law.

In concluding that civil penalties assessed under Ohio Rev. Code § 6111.09 arise under federal law, the Sixth Circuit relied heavily (App., *infra*, 6a-8a) on the fact that state permit programs must be reviewed and approved by EPA in accordance with federal minimum standards before they are allowed to supplant the EPA permit program. But EPA approval of a state scheme cannot convert civil penalties assessed under that scheme into penalties that arise under federal law. Because entities in Ohio are generally required *under state law* to comply with the state statutory scheme regardless of whether the scheme receives EPA approval, such approval does not alter any obligations imposed under state law. Although EPA approval does eliminate the need for Ohio entities to obtain federal, as well as state, permits, that effect merely demonstrates that Congress chose to limit—not expand—the role of federal law

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120, 125 (1982) (using EPA's civil penalty policy to decide upon size of civil penalty under state law). Yet that choice has no bearing on whether a question of state or federal law is involved. Moreover, it is clear that many issues will be resolved in substantially different ways under state or federal law. For example, the maximum federal penalty permitted under the CWA Section 309(d), 33 U.S.C. 1319(d), is $25,000 per day for each violation; the maximum daily penalty under Ohio Rev. Code Ann. § 6111.09 (Anderson Supp. 1987) is $10,000.

where state law adequately protects against water pollution.

At most, it could be argued that the federal statute is ambiguous concerning whether penalties imposed under a federally approved state program should be considered penalties arising "under federal law." But it is fundamental that any such ambiguity must be resolved against, rather than in favor of, a waiver of sovereign immunity (see pp. 15-16, *supra*).

4. *RCRA* Aside from a single district court decision now pending appeal, every court that has addressed the issue has agreed with the Sixth Circuit's holding that the federal facilities provision of RCRA, Section 6001, 42 U.S.C. 6961, does not waive federal sovereign immunity from civil penalties. See *United States* v. *Washington*, 872 F.2d 874 (9th Cir. 1989); *Mitzelfelt* v. *Department of Air Force*, 903 F.2d 1293 (10th Cir. 1990); *McClellan Ecological Seepage Situation (MESS)* v. *Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986); *Florida Dep't of Envtl. Regulation* v. *Silvex Corp.*, 606 F. Supp. 159 (M.D. Fla. 1985); *Meyer* v. *United States Coast Guard*, 644 F. Supp. 221 (E.D.N.C. 1986); cf. *California* v. *Walters*, 751 F.2d 977 (9th Cir. 1984) (criminal penalties). But see *Maine* v. *Department of the Navy*, 702 F. Supp. 322 (D. Me. 1988), appeal pending, No. 86-0211P (1st Cir.).[19] That conclusion follows from the language of RCRA Section 6001, which differs from the language of CWA Section 313(a) in making explicit that the "sanctions" as to which immunity is waived are "such sanctions as may be imposed by a court to enforce [injunctive]

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[19] Cf. *Alabama* v. *Veterans Administration*, 648 F. Supp. 1208, 1210-1211 (M.D. Ala. 1986) (interpreting federal facilities provision of Clean Air Act).

relief," and in omitting any express reference whatever—even in a limiting proviso—to civil penalties. As the court of appeals recognized, the differences between CWA Section 313(a) and RCRA Section 6961 reinforce the conclusion that no waiver as to civil penalties was intended in the latter provision. See App., *infra*, 11a-12a.

The Sixth Circuit erred, however, in holding that Congress waived federal sovereign immunity from civil penalties in RCRA's citizen suit provision, Section 7002(a), 42 U.S.C. 6972(a). The key statutory language on which the court relied was that which includes "the United States" among the entities that are subject to suit, which is coupled with the provision that, in addition to enjoining violations and ordering compliance, "[t]he district court shall have jurisdiction * * * to apply any appropriate civil penalties under section 6928(a) and (g) [the civil penalty provisions] of this title." Relying primarily on statements in the legislative history of RCRA (see App., *infra*, 15a) and the "underlying congressional policy * * * to eliminate the unsafe disposal of hazardous wastes" by federal facilities (App., *infra*, 15a-16a), the Sixth Circuit held that "[t]he fairest reading" of the above language "includes the United States in the application of civil penalties." App., *infra*, 15a.

The Sixth Circuit's conclusion that Congress intended to waive federal sovereign immunity from civil penalties in the citizen suit provision is mistaken. The word "appropriate" qualifies the phrase "civil penalties under [RCRA Section 3008(g), 42 U.S.C. 6928(g)]." [20] By including that qualification,

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[20] Section 7002(a) authorizes a district court in a citizen suit to assess civil penalties under 42 U.S.C. 6928(a), as well

Congress plainly intended to limit the applicability of such penalties, not to expand the number of entities otherwise subject to them. RCRA Section 3008(g), 42 U.S.C. 6928(g), authorizes civil penalties against "[a]ny person who violates any requirement" of RCRA. Since the United States is not a "person" for purposes of RCRA (see RCRA Section 1004(15), 42 U.S.C. 6903(15)), it is never "appropriate" to assess civil penalties against the United States under RCRA Section 3008(g). Therefore, although the citizen suit provision plainly authorizes civil penalties where "appropriate"—*i.e.*, against parties other than the federal government who meet the other requirements for such penalties—it equally plainly prohibits such penalties where not "appropriate"—*i.e* , against federal defendants.

Even if the language of the statute were less clear, the Sixth Circuit's conclusion would be implausible. Initially, it would have been illogical for Congress to refrain from waiving federal sovereign immunity from civil penalties in the federal facilities provision of the Act—the provision specifically addressing the extent to which the federal government is subject to RCRA—but then to undo the limitations of its carefully-crafted waiver of sovereign immunity in the more broadly applicable citizen suit provision. Moreover, the civil penalties available under the citizen suit provision in a suit against any entity—state, local, or private—are those assessed under RCRA's civil penalty provisions; therefore, they are necessarily *federal* civil penalties payable to the federal

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as 42 U.S.C. 6928(g). Because RCRA Section 3008(a), 42 U.S.C. 6928(a), authorizes civil penalties in EPA-initiated enforcement actions, that provision is inapplicable in this case.

treasury. The civil penalties that the State seeks would consequently simply be transferred from one account in the federal treasury to another; surely it should not be assumed absent some more explicit statement that Congress thus intended such a shift in funds amongst Treasury accounts through a procedure outside congressional control.[21]

The majority's bald assertion that the "fairest reading" of Section 6972 includes the United States in the application of civil penalties misapprehends the most plausible reading of the statute and disregards controlling principles of statutory interpretation regarding waivers of sovereign immunity by resolving a statutory ambiguity in favor of a waiver. Because the Sixth Circuit's decision also threatens to upset the careful balance Congress drew with respect to environmental litigation concerning federal facilities, and because the related RCRA and CWA issues in this case are profitably considered together, review by this Court is warranted.

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[21] In 1979, the Department of Justice sought a ruling from the Comptroller General as to whether federal civil penalties under an analogous provision of the Clean Air Act would be payable from the permanent indefinite appropriation available for satisfaction of judgments against the federal government (see 28 U.S.C. 2414; 31 U.S.C. 724a) or from appropriations available to the defendant agency. The Comptroller General determined that the source of funds depends on whether the agency contests its liability for the penalty (in which case payment could come from the judgment fund) or concedes such liability (in which case the payment must come from program funds). 58 Comp. Gen. 667 (1979).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 89-3329

STATE OF OHIO, ANTHONY J. CELEBREEZE, JR., ATTORNEY GENERAL, PLAINTIFFS-APPELLEES

v.

U.S. DEPARTMENT OF ENERGY, DEFENDANT-APPELLANT

JOHN S. HERRINGTON, SECRETARY OF ENERGY; NLO, INC.; NL INDUSTRIES, INC., DEFENDANTS

Argued Dec. 7, 1989

Decided June 11, 1990

Before MARTIN, JONES and GUY, Circuit Judges.

BOYCE F. MARTIN, Jr., Circuit Judge.

This interlocutory appeal requires us to determine whether the United States has waived its sovereign immunity for actions for civil damages under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, and the Clean Water Act, 33 U.S.C. § 1251 *et seq.* We affirm the district court's decision

that sovereign immunity was waived under both statutes.

The United States Department of Energy owns a 1,050 acre uranium processing plant in Fernald, Ohio that is operated under a management contract by private contractors. The Fernald facility processes uranium for the production of nuclear weapons. The Fernald facility does not have a nuclear reactor, but processes performed there generate both radioactive and non-radioactive hazardous wastes.

In March 1986, the State of Ohio filed this action against the Department of Energy, the Secretary of the Department of Energy, and its private contractors, seeking civil penalties and other relief. The State of Ohio alleges that the defendants improperly disposed of hazardous wastes, released radioactive materials into the environment, and polluted surface and ground water. The State of Ohio grounds its claims primarily in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*, the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, the Ohio Solid & Hazardous Waste Control Act, Ohio Rev.Code § 3734, and the Ohio Water Pollution Control Act, Ohio Rev.Code § 6111.

The Department of Energy moved to dismiss the claims for civil penalties as barred by sovereign immunity. The district court denied this motion, holding that sovereign immunity was waived under the Resource Conservation and Recovery Act and the Clean Water Act. The district court certified its decision for immediate appeal because the decision involves a controlling question of law and immediate appeal may advance the ultimate resolution of the

litigation. 28 U.S.C. § 1292(b). We exercised our discretion to hear this interlocutory appeal on whether sovereign immunity was waived. *Id.*

A waiver of sovereign immunity must be clear, express, and unambiguous; it cannot be implied from vague language. *Block v. North Dakota*, 461 U.S. 273, 280, 103 S.Ct. 1811, 1816, 75 L.Ed.2d 840 (1983); *Hancock v. Train*, 426 U.S. 167, 187, 96 S.Ct. 2006, 2016, 48 L.Ed.2d 555 (1976) (applied to environmental law). In determining whether a waiver is clear, the controlling factor is the "underlying congressional policy." *Franchise Tax Bd. v. U.S. Postal Service*, 467 U.S. 512, 521, 104 S.Ct. 2549, 2554, 81 L.Ed.2d 446 (1984). We must avoid the temptation to seek any hint of ambiguity that can be used to twist the statute into denying sovereign immunity. *See id.* When Congress enacts a clear waiver, that waiver should not be "thwarted by an unduly restrictive interpretation" in the courts. *Canadian Aviator v. United States*, 324 U.S. 215, 65 S.Ct. 639, 89 L.Ed. 901 (1945).

I. *The Clean Water Act*

We first address whether Congress waived sovereign immunity in the Clean Water Act, 33 U.S.C. § 1323, for claims brought by the State of Ohio under the Clean Water Act and Ohio Water Pollution law. Section 1323 states:

> (a) *Each department*, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants and each officer, agent, or employee thereof in the

> performance of his official duties, *shall be subject to, and comply with, all Federal, State, interstate, and local requirements*, administrative authority, and process *and sanctions* respecting the control and abatement of water pollution in the same manner, and *to the same extent as any nongovernmental entity* including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) *to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers*, agents, or employees under any law or rule of law. . . .
>
> No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and *the United States shall be liable only for those civil penalties arising under Federal law* or imposed by a State or local court to enforce an order or the process of such court. . . .

33 U.S.C. § 1323 (emphasis added). This statutory language should be interpreted according to its ordinary usage. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 n. 20, 96 S.Ct. 1375, 1384 n. 20, 47 L.Ed.2d 668 (1976). The first sentence of section 1323 subjects the Department of Energy to "any requirement," including "sanctions," to the same extent as a private entity under the Act. Subsection C

specifically states that sovereign immunity is waived for *any* sanction. Any reader would interpret this statement to subject the Department of Energy to civil penalties. In addition, the Oxford English Dictionary defines "sanction" as "[t]he *specific penalty* enacted in order to enforce obedience to the law." The Compact Edition of the Oxford English Dictionary 2633 (1971) (emphasis added). *See Hochfelder*, 425 U.S., at 199 n. 20, 96 S.Ct. at 1384 n. 20 (a dictionary may show ordinary usage). According to its ordinary usage, the language of the waiver of sovereign immunity in section 1323 clearly includes civil penalties.

Congress's 1977 amendment to the Clean Water Act further evidences its intent to waive federal sovereign immunity to civil penalties. Section 1323 was amended in the aftermath of *EPA v. Cal. ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976), in which the Court interpreted an earlier version of section 1323 subjected federal agencies to "Federal, State, interstate, and local requirements . . . to the same extent as any person is subject to such requirements." 33 U.S.C. § 1323 (1970). The Court distinguished between substantitve and procedural requirements and held that Congress had not waived sovereign immunity for procedural requirements, including all enforcement mechanisms.[1] The Court held that section

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[1] Although *State Water Resources Control Bd.* and its companion case, *Hancock v. Train*, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976), concerned injunctive relief, the Court discussed the issues in terms of enforcement mechanisms. The Court did not distinguish between injunctive relief and civil penaties or damages because it viewed both as procedural requirements, not covered by its interpretation of the pollution acts.

1323 merely subjected federal facilities to the substantive pollution limits in state laws. Following that decision, Congress amended the Clean Water Act, stating that federal facilities were subject to "all" requirements, including "process and sanctions." The amendment clearly subjects federal agencies to civil penalties. The fact that the amendment was provoked by a Supreme Court decision protecting sovereign immunity underscores Congress's determination to waive sovereign immunity for civil penalties.

If Congress's amendment of the Clean Water Act did not waive sovereign immunity for civil penalties, it would be impossible to give meaning to each part of section 1323. The Supreme Court has stated, "It is axiomatic that all parts of an Act 'if at all possible, are to be given effect.'" *F.A.A. Administrator v. Robertson*, 422 U.S. 255, 261, 95 S.Ct. 2140, 2145, 45 L.Ed.2d 164 (1975), *quoting Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633, 93 S.Ct. 2469, 2485, 37 L.Ed.2d 207 (1973) (citations omitted). Section 1323 explicitly limits its waiver of sovereign immunity for civil penalties to those "arising under federal law." This limit would become superfluous if section 1323 were interpreted as not waiving sovereign immunity for civil penalties at all.

In order for the claims brought by the State of Ohio to fall within the waiver of sovereign immunity, those claims must arise under federal law. *See* 33 U.S.C. § 1323. Claims brought under the Clean Water Act itself, such as the claims under 33 U.S.C. § 1365, clearly arise under federal law.

The claims brought under the Ohio water pollution laws also arise under federal law because of the legislative scheme of the Clean Water Act. *See* Ohio Rev.Code § 6111.09. The Clean Water Act mandates that the states may create their own water pollution

laws, which may qualify to *replace* the requirements of the Clean Water Act. 33 U.S.C. § 1342(b). Upon implementing a state permit program "in accordance with" 33 U.S.C. § 1342, the state assumes responsibility for pollution permits on behalf of and instead of the Environmental Protection Agency. 33 U.S.C. § 1342(c). The Environmental Protection Agency is charged with promulgating the standards that state programs must meet to obtain approval. 33 U.S.C. § 1342; *see* 40 C.F.R. § 123 (regulations setting forth the requirements for state programs to be approved). In order to be approved, a state law must provide for civil penalties. 33 U.S.C. § 1342(b)(7); 40 C.F.R. § 123.27(a)(3). Once a state water pollution law is approved, compliance with the state law *is* compliance with the Clean Water Act. 33 U.S.C. § 1342(k). Thus, under the terms of the Clean Water Act, a qualifying state water pollution law, including its civil penalties, arises under federal law.

Other sections of the Clean Water Act emphasize Congress's intent that claims under state pollution laws may arise under federal law. The introductory section of the Clean Water Act states, "It is the policy of Congress that the States . . . implement the policy programs *under* sections 402 and 404 of this Act." 33 U.S.C. § 1251(b) (emphasis added). Congress continually uses language such as "permit issued *under* Section 402 of this Act . . . by a State." 33 U.S.C. § 1319(a) (emphasis added); *see* 33 U.S.C. §§ 1319(c), 1391(d), 1311(i). Further, the Clean Water Act empowers the Environmental Protection Agency to enforce state permits as federal requirements. 33 U.S.C. § 1319(a). Thus, practically speaking, actions under a qualifying state water pollution law arise under federal law.

The Ohio water pollution law, codified at Ohio Rev. Code § 6111, arises under federal law because it is an approved state water pollution law. It is uncontroverted that the Ohio Water Pollution Act meets the requirements of the Clean Water Act. Indeed, as authorized by Congress, the Environmental Protection Agency has suspended its issuance of permits in Ohio in favor of the state's issuance of permits under the Ohio Water Pollution Act pursuant to 33 U.S.C. § 1342(c)(1). The Ohio Act specifically requires the Director of the Ohio Environmental Protection Agency to manage the Ohio pollution permit program in compliance with the Clean Water Act. The Ohio Act also bars the Director from issuing a permit to which the federal Environmental Protection Agency objects. Ohio Rev.Code § 6111.03(J)(3). The limitation of the waiver of sovereign immunity to civil penalties arising under federal law is aimed at state water pollution laws that fail to meet approval under the Clean Water Act; it is not aimed at approved laws such as Ohio Rev.Code § 6111.

Congress clearly has waived sovereign immunity for civil penalties of federal agencies that violate the Clean Water Act and the Ohio Water Pollution Act. Thus, we need not consider the State of Ohio's alternative argument that the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, authorizes civil penalties against federal facilities.

II. *The Resource Conservation and Recovery Act*

The Department of Energy also appeals the district court's determination that the general waiver provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6961, waives sovereign immunity in regard to civil penalties. The State of Ohio responds

that the district court correctly decided this question and, in the alternative, contends that sovereign immunity has been waived under the citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972. We hold that Congress did not waive sovereign immunity for civil penalties under the general waiver, but that Congress did waive sovereign immunity for civil penalties under the citizen suit provision.

A. *General Waiver*

Congress has at least waived the immunity of the United States in 42 U.S.C. § 6961, which states:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management or solid waste or hazardous waste *shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief by a court to enforce such relief)*, respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. *Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court, with respect to the enforcement of any such injunctive relief.*

42 U.S.C. § 6961 (emphasis added). This section renders the federal government subject to the "requirements" of federal, state and local laws. The issue is whether "requirements" includes civil penalties in an action brought by a state. Despite indications that Congress intended to waive sovereign immunity for civil penalties here, we find that any such waiver is not stated clearly enough to be recognized. *See Block v. North Dakota*, 461 U.S. 273, 280, 103 S.Ct. 1811, 1816, 75 L.Ed.2d 840 (1983).

An ordinary reading of the phrase, "all . . . requirements," indicates that a civil penalty is a "requirement" because a party violating the statute will be required to pay the penalty. Circumstances surrounding the passage of the Resource Conservation and Recovery Act also support a finding that "requirements" include civil penalties. Congress enacted the Resource Conservation and Recovery Act a few months after the Supreme Court decisions in *Hancock v. Train*, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed. 2d 555 (1976), and *EPA v. Cal. ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976). These decisions held that Congress did not waive sovereign immunity for procedural requirements, including enforcement mechanisms, in its previously enacted environmental statutes. The Court explicitly based its holding on the fact that the statutory waivers said "requirements" rather than "all requirements." *Hancock*, 426 U.S. at 182, 96 S.Ct. at 2014; *State Water Resources Control Bd.*, 426 U.S. at 214, 96 S.Ct. at 2029 (stating that its reasoning in *Hancock* controls sovereign immunity questions arising under the Clean Water Act as well). In the Resource Conservation and Recovery Act, Congress used the specific language "all requirements," that the Court reasoned to be adequate to

subject the federal government to enforcement mechanisms of state statutes. Thus, Congress *may* have intended to waive sovereign immunity for civil penalties.

Despite these considerations, we decline to find a waiver of immunity for civil penalties under section 6961 because of two complications. The first complication is the difference between the language in section 6961 and the waiver provision in the Clean Water Act provides that federal facilities are subject to both "all requirements" and "sanctions" of federal and state law. 33 U.S.C. § 1321. If "all requirements" includes sanctions, then the discussion of sanctions would be superfluous. In addition, the waiver provision in the Clean Water Act expressly limits the waiver of sovereign immunity to "those civil penalties arising under Federal law." *Id.* As we have already noted, this limit protects the United States from civil penalties under the state water pollution laws that do not have federal approval. Like the Clean Water Act, the Resource Conservation and Recovery Act is an umbrella act for state pollution laws, but, unlike the Clean Water Act, it lacks language to protect the United States from suits under unapproved state laws. Although Congress may have intended to waive sovereign immunity in the Resource Conservation Act, the differences between the Resource Conservation Act and the Clean Water Act make any waiver less than clear.

Second, section 6961 explicitly discusses injunctive relief twice, but never mentions monetary relief or civil penalties. The last statement of section 6961 specifically waives sovereign immunity for injunctive relief and sanctions to enforce injunctive relief. Also, the parenthetical in section 6961, which lists requirements to which the United States may be subjected,

specifically discusses injunctive relief, but it does not mention monetary relief. The list in this parenthetical begins with "including" and we interpret it to be a suggestive rather than exhaustive list. *See P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77 n. 7, 100 S.Ct. 328, 334 n. 7, 62 L.Ed.2d 225 (1979). Yet the specific mention of injunctive sanctions appears to omit civil penalties too neatly to be an accident. It may be that monetary relief and civil penalties are included in "requirements," as suggested above, but such an interpretation would rest on ambiguous evidence.

In order for us to recognize a Congressional waiver of sovereign immunity, the waiver must be clear-cut. *Block v. North Dakota*, 461 U.S. 273, 280, 103 S.Ct. 1811, 1816, 75 L.Ed.2d 840 (1983); *Hancock v. Train*, 426 U.S. 167, 187, 96 S.Ct. 2006, 2016, 48 L.Ed.2d 555 (1976). We find no such clear waiver here. The Ninth Circuit has found a different plausible reading of section 6961 by distinguishing between requirements and enforcement mechanisms. *People v. Walters*, 751 F.2d 977, 978 (9th Cir.1984) (per curiam) (holding that sovereign immunity was not waived to allow state criminal sanctions because such sanctions are enforcement devices). In *United States v. State of Washington*, 872 F.2d 874 (9th Cir.1989), the Ninth Circuit held that the Resource Conservation and Recovery Act did not waive sovereign immunity for civil penalties because such penalties were enforcement mechanisms. Like the Ninth Circuit, we fail to find a clear waiver of sovereign immunity for civil penalties in section 6961.

B. *Citizen Suit Provision*

Congress clearly waived sovereign immunity for civil penalties in the citizen suit provision of the Re-

source Conservation and Recovery Act, 42 U.S.C. § 6972.[2] Section 6972 states in relevant part:

> (a) Except as provided in subsection (b) or (c) of this section, *any person may commence a civil action on his own behalf*—
>
> (1)(A) *against any person (including (a) the United States, and (b) any other governmental instrumentality or agency*, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or
>
> (B) *against any person, including the United States and any other governmental instrumentality or agency*, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

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[2] The Ninth Circuit did not address this issue in either *Walters*, 751 F.2d 977, or *Washington*, 872 F.2d 874.

> . . . *The district court shall have jurisdiction*, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(a), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(b), to order such person to take such action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and *to apply any appropriate civil penalties under section 6928(a) and (g) of this title.*

Id. (emphasis added). The State of Ohio may bring its action under the citizen's suit provision because the definition of "person" includes states under the Resource Conservation and Recovery Act. 42 U.S.C. § 6903(15). The citizen's suit provision explicitly allows the action to be brought against the United States or a federal instrumentality, agency, or administrator. In bringing the action, the State of Ohio may seek civil penalties under 42 U.S.C. §§ 6928(a), 6928(g).

The Department of Energy argues that the United States is not included in the scope of the civil penalties allowed under the citizen's suit provision. Civil penalties are included in section 6972 by reference to another section of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928, but the United States is included in the definition of a "person" *only* under section 6972. *Compare* 42 U.S.C. § 6972(a)(1) (specifically including the United States as a "person")

with 42 U.S.C. § 6903(15) (United States not included in general definition of "person"). In order to find that Congress clearly waived sovereign immunity for civil penalties, we must find that Congress clearly intended that its specific inclusion of the United States for citizen suits would extend to the application of civil penalties.

The fairest reading of section 6972 includes the United States in the application of civil penalties. Section 6972 incorporates the civil penalty sections, not vice versa. Thus, the definition of "person" within section 6972 applies, not the general definition in 42 U.S.C. § 6903(15). This definition of "person" within section 6972 includes the United States. In addition, the legislative history demonstrates that Congress intended to subject the United States to civil penalties in citizen suits. The Senate Committee stated:

> Either a noncomplying agency [or] the Administrator, if he fails to act, are subject to the citizen suit and penalty provisions of section 7002. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suit against "any person, including the United States. . . ."

S.Rep. No. 284, 98th Cong., 1st Sess. 44 (1983). Although this discussion concerns the requirements for federal facilities to submit an inventory of hazardous waste sites to the Environmental Protection Agency, this statement shows the Senate's intent that civil penalties would be available in a citizen's suit against the United States.

Congress's waiver of sovereign immunity for civil penalties accords with the underlying congressional

policy of the Resource Conservation and Recovery Act to eliminate the unsafe disposal of hazardous wastes. H.R.Rep. No. 1491, 94th Cing., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.Code Cong. & Admin.News 6238, 6241; *see Franchise Tax Bd. of Cal. v. U.S. Postal Service*, 467 U.S. 512, 521, 104 S.Ct. 2549, 1554, 81 L.Ed.2d 446 (1984). Congress expressed great concern for hazardous waste disposal at federal facilities because the federal government owned over 20,000 such facilities. H.R.Rep. No. 1491 at 46, *reprinted in* 1976 U.S.Code Cong. & Admin.News at 6284. Far from protecting federal facilities from failure to comply with hazardous waste pollution laws, Congress demanded that federal facilities "provide national leadership in dealing with solid waste and hazardous waste disposal systems." S.Rep. No. 988, 94th Cong., 2d Sess., 24 (1976). In light of these broad goals, the clear interpretation of Congress's later addition of civil penalties is that Congress intended to apply those penalties to federal facilities as well as private entities, consistent with the other aspects of the citizen suit provision.

We find that Congress has waived sovereign immunity for civil penalties under both the Clean Water Act and the Resource Conservation and Recovery Act. Therefore, the judgment of the district court is affirmed.

GUY, Circuit Judge, dissenting.

The majority's opinion in this case establishes that the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1323(a), and the citizen suit provision of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972, evince congressional intent to waive sovereign immunity as to

civil penalties assessed against the United States Department of Energy (DOE). Because I find the waiver in each statute too narrow to support the imposition of civil sanctions in this case, I respectfully dissent from the majority's rulings regarding both the Clean Water Act and the citizen suit provision of the RCRA.[1]

I.

The principle of sovereign immunity is deeply rooted in American jurisprudence. The Supreme Court has consistently emphasized that "[a]s sovereign, the United States, in the absence of its consent, is immune from suit." *Library of Congress v. Shaw*, 478 U.S. 310, 315, 106 S.Ct. 2957, 2962, 92 L.Ed.2d 250 (1986). Therefore, "[t]he States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States" absent an "express waiver of this immunity by Congress." *Block v. North Dakota*, 461 U.S. 273, 280, 103 S.Ct. 1811, 1816, 75 L.Ed.2d 840 (1983). In discerning whether a statute contains such a waiver, courts must not adopt a "crabbed construction" of statutory language or demand that Congress utilize a "ritualistic formula" to relinquish sovereign immunity. *Franchise Tax Board v. United States Postal Serv.*, 467 U.S. 512, 521, 104 S.Ct. 2549, 2554, 81 L.Ed.2d 446 (1984). Nevertheless, it is undisputed that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' "

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[1] I agree with the majority's conclusion that the general waiver of sovereign immunity contained in the RCRA, 42 U.S.C. § 6961, does not permit recovery of civil penalties. *See also United States v. State of Washington*, 872 F.2d 874, 880 (9th Cir.1989). To that extent, therefore, I join section II(A) of the majority opinion.

Selden Apartments v. United States Dep't of Hous. and Urban Dev., 785 F.2d 152, 156 (6th Cir. 1986) (quoting *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1503, 23 L.Ed.2d 52 (1969)). Accordingly, it is our responsibility to select "[t]he most natural reading" of the statutory terminology in ascertaining whether the United States has waived sovereign immunity. *See Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57, 108 S.Ct. 376, 381, 98 L.Ed.2d 306 (1987).

II.

The Clean Water Act's provision governing federal agencies' obligations, *see* 33 U.S.C. § 1323(a), which became law in its present form in 1977,[2] *see* Pub.L. No. 95-217, § 61(a), 91 Stat. 1598 (1977), contains language differing from the RCRA analogue that the majority properly treats as insufficiently broad to encompass civil penalties. *Compare* 33 U.S.C. § 1323 (a) *with* 42 U.S.C. § 6961. Consequently, the majority's conclusion that the general waiver provision in the RCRA "does not permit civil penalties should not automatically be applied to the [Clean Water Act]." *Metropolitan Sanitary Dist. of Greater Chicago v. United States Dep't of the Navy*, 722 F.Supp. 1565, 1570 n. 3 (N.D.Ill.1989). However, I disagree with

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[2] The statutory language was altered to counter-act the Supreme Court's 1976 decisions in *Hancock v. Train*, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976), and *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976), which restricted the sovereign immunity waiver prescribed by the former Clean Water Act and Clean Air Act provisions to substantive standards. *See e.g.*, S.REP. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S.CODE CONG. & ADMIN.NEWS 4326, 4392.

the majority's interpretation of the general waiver provision contained in the Clean Water Act as broad enough to support imposition of civil penalties against the DOE.

A.

Compared to the RCRA's general waiver provision, *see* 42 U.S.C. § 6961, the pertinent portions of 33 U.S.C. § 1323(a) provide a lucid description of the extent to which sovereign immunity has been waived under the Clean Water Act. Specifically, section 1323(a) states:

> *Each department, agency,* or instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . *shall be subject to,* and comply with, *all* Federal, State, interstate, and local *requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution* in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. *This subsection shall apply notwithstanding any immunity of such agencies,* officers, agents, or employeees *under any law or rule of law. . . . [T]he United States shall be liable only for those civil penalties arising under Federal law* or imposed by a State

> or local court to enforce an order or the process of such court. (Emphasis added).

The Clean Water Act thus extends the obligation of federal departments and agencies to all "sanctions respecting the control and abatement of water pollution[.]" *See* 33 U.S.C. § 1323(a). Moreover, congressional delineation of federal agencies' responsibilities under the Clean Water Act speaks of "any process and sanction" in addition to "any requirement whether substantive or procedural[.]" *Compare id.* § 1323(a)(2)(A) *with id.* § 1323(a)(2)(C). I agree with the majority that this language undoubtedly encompasses civil penalties. However, Congress inserted language in section 1323(a) that limits federal liability to "those civil penalties arising under Federal law[,]" thereby acknowledging the previously expressed waiver of sovereign immunity while circumscribing its scope. *See, e.g., Metropolitan Sanitary Dist.*, 722 F.Supp. at 1571-72. Analysis of section 1323(a) therefore leads to the inescapable conclusion that Congress has waived sovereign immunity in the Clean Water Act for all civil penalties arising under federal, but not state, law.[3]

B.

The dispositive question in this case, as the majority observes and the district court aptly noted, is whether the civil penalties at issue arise under fed-

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[3] The district court in *McClellan Ecological Seepage Situation v. Weinberger*, 655 F.Supp. 501 (E.D.Cal.1986), similarly interpreted 33 U.S.C. § 1323(a), but rejected such a construction as an inadequate "vehicle to end the pollution which this country is facing[.]" *Id.* at 604. Courts need not debate Congress's sagacity, however, when its intent is so apparent from the face of the statute.

eral law. *See State of Ohio v. United States Dep't of Energy*, 689 F.Supp. 760, 767 (S.D.Ohio 1988). The State of Ohio contends that its permit system, which is federally approved and monitored, authorizes civil penalties against the DOE for pollution discharge violations. The DOE characterizes Ohio's permit system as purely a state law scheme, and adamantly contests Ohio's assertion that sanctions for violations of its pollution discharge permit arise under federal law. Resolution of this issue, therefore, depends upon the origin and nature of Ohio's permit system.

Although the Clean Water Act prohibits the discharge of any pollutant into navigable waters[,]" *Gwaltney*, 484 U.S. at 52, 108 S.Ct. at 379 (citing 33 U.S.C. § 1311(a)), an exception to this general rule empowers the Environmental Protection Agency (EPA) to issue permits allowing pollution discharge "in accordance with specified conditions." *See id.* (citing 33 U.S.C. § 1342(a)). Issuance of a permit "serves to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger[.]" *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, 96 S.Ct. 2022, 2025, 48 L.Ed.2d 578 (1976). This permit concept, known as the National Pollutant Discharge Elimination System (NPDES), is operated and policed exclusively by the EPA absent state participation. *See* 33 U.S.C. § 1342(a); *see also American Paper Inst., Inc. v. EPA*, 890 F.2d 869, 871 (7th Cir.1989). The congressionally designed permit scheme, however, leaves substantial leeway for state participation. *See American Paper*, 890 F.2d at 873

("[T]he Clean Water Act evince[s] a strong congressional intent to make the states, where possible, the primary regulators of the NPDES system.").

As we have explained, 33 U.S.C. § 1342(b) allows a state "to administer its own permit program for discharges into navigable waters within its jurisdiction upon approval of the program by [the] EPA." *United States ex rel. Tennessee Valley Auth. v. Tennessee Water Quality Control Bd.*, 717 F.2d 992, 998 (6th Cir.1983), *cert. denied*, 466 U.S. 937, 104 S.Ct. 1909, 80 L.Ed.2d 458 (1984). "Once the [EPA]'s approval is given, the State may issue NPDES permits as long as the permits meet the requirements of the [Clean Water Act]." *Ford Motor Co. v. EPA*, 567 F.2d 661, 664 (6th Cir.1977). When a state assumes responsibility for the NPDES permit program, the Clean Water Act "calls for the [EPA] Administrator to suspend the issuance of federal permits as to waters subject to [the] approved state program." *Gwaltney*, 484 U.S. at 52, 108 S.Ct. at 379 (citing 33 U.S.C. § 1342(c)(1)). Nevertheless, the EPA does retain the power to "review operation of a State's permit program[,]" *EPA v. California*, 426 U.S. at 208, 96 S.Ct. at 2026, "veto . . . a State's issuance of an individual permit[,]" *Ford*, 567 F.2d at 664, and "withdraw approval of a state permit program which is not being administered in compliance with" 33 U.S.C. § 1342. *EPA v. California*, 426 U.S. at 208, 96 S.Ct. at 2026. Thus, an approved state permit program is largely autonomous, but still subject to general federal oversight.

C.

The State of Ohio formulated a water pollution control scheme including a NPDES permit program

for federal facilities, *see* Ohio Rev. Code Ann. §§ 6111.01 *et seq.* (Anderson 1977 & Supp.1989), which gained EPA approval in 1983. *See* 48 Fed. Reg. 5,918 (1983). Consistent with the Clean Water Act's statutory directive, *see* 33 U.S.C. § 1342(b)(7), the State of Ohio incorporated a civil penalty provision into its permit program. *See* Ohio Rev.Code Ann. § 6111.09. When the State of Ohio assumed administrative and enforcement responsibilities for its NPDES program concerning federal sites in 1983, the state inherited the task of monitoring the DOE's compliance with the permit at issue in this case. The state subsequently became dissatisfied with the DOE's performance at the Fernald facility and filed this suit requesting that the district court impose civil penalties pursuant to the Ohio penalty provision.

Contrary to the majority's conclusion, the civil sanctions prescribed by Ohio's statutory scheme, in my view, do not "aris[e] under Federal law." *See* 33 U.S.C. § 1323(a). Congress therefore has not waived sovereign immunity as to such penalties. Although the Clean Water Act encourages inclusion of "civil and criminal penalties" in state permit programs, *see* 33 U.S.C. § 1342(b)(7), and the EPA retains limited authority to oversee approved state NPDES schemes, the Clean Water Act unequivocally indicates that state permit programs are "establish[ed] and administer[ed] under *State* law." *See* 33 U.S.C. § 1342(b) (emphasis added). Moreover, the Clean Water Act's legislative history emphasizes that "state permit programs are 'not a delegation of Federal authority,' but instead are state programs which 'function[] in lieu of the Federal program.'" *State of California v. United States Dep't of the Navy*, 845 F.2d 222, 225 (9th Cir.1988) (quoting H.R.REP. No.

830, 95th Cong., 1st Sess. 104, *reprinted in* 1977 U.S.Code Cong. & Admin. News 4327, 4479). While "[t]he right of the State [of Ohio] to require discharge permits is derived solely from [33 U.S.C. § 1342]," *Tennessee Water Bd.*, 717 F.2d at 999, the penalty provisions adopted by the State of Ohio in furtherance of its permit program are not grounded in federal law. *See, e.g., U.S. Dep't of the Navy*, 845 F.2d at 225-226. Consequently, sovereign immunity precludes the State of Ohio from pressing its claims for state civil penalties against the DOE under the Clean Water Act. *See id.* I dissent from the majority's contrary conclusion.

III.

The RCRA's citizen suit provision expressly indicates that "any person may commence a civil action on his own behalf" against "any person, including the United States and any other governmental instrumentality or agency" to redress violations of the RCRA. *See* 42 U.S.C. §§ 6972(a)(1)(A) & (B). Because the RCRA's definition of a "person" includes states, *see* 42 U.S.C. § 6903(15), the majority is correct in finding that the RCRA's citizen suit provision authorizes the State of Ohio to bring a citizen suit against the DOE. However, I believe that the majority errs in defining the scope of the DOE's exposure under the RCRA citizen suit provision to include civil penalties.

According to the RCRA citizen suit provision, "[t]he district court shall have jurisdiction" only to enforce permits and standards, to restrain mishandling of solid or hazardous waste, to order the Administrator to perform specified acts and duties, and "to apply any appropriate civil penalties under section

6928(a) and (g) of this title." 42 U.S.C. § 6972(a); *cf. also Walls v. Waste Resource Corp.*, 761 F.2d 311, 315 (6th Cir.1985) (the "liberal grant of standing to sue" in the RCRA citizen suit provision "is limited by subsequent provisions which restrict the type of relief available to injunctive and other equitable remedies"). Consequently, judicial authority to impose civil penalties in response to RCRA citizen suits is limited to sanctions permitted under 42 U.S.C. §§ 6928(a) and (g). Sections 6928(a) and (g), in turn, permit the imposition of civil penalties against "any person" responsible for violating the RCRA. Whether such penalties may be assessed against the DOE, therefore, depends upon whether the DOE (or the United States in general) can be characterized as a "person" under the RCRA. On this pivotal issue, I disagree with the majority's determination that the federal government constitutes a "person" for purposes of the RCRA.

Congress chose to define the term "person" for purposes of the RCRA to include "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body." *See* 42 U.S.C. § 6903(15). In a RCRA citizen suit, each of these "persons" is potentially subject to civil penalties as allowed by 42 U.S.C. §§ 6928(a) and (g). Conspicuous by its absence from the statutory list of "persons," however, is the United States. *See McClellan Ecological Seepage Situation v. Weinberger*, 655 F. Supp. 601, 603 (E.D.Cal.1986) ("[T]he general definition of 'person' in RCRA § 1004(15), 42 U.S.C. § 6903(15), . . . seems to name everyone under the sun save for the United States of America."). The

only reasonable inference that can be drawn from this noticeable omission is "that indeed Congress did not intend, nor did it legislate specifically, a waiver of sovereign immunity for civil penalties under the [RCRA] citizen suit provision." *Id.* at 603-04.

The majority reads the langauge from the citizen suit provision authorizing the commencement of an action against "any person, including the United States and any other governmental instrumentality" as incorporating the United States within the definition of a "person" susceptible to civil penalties under 42 U.S.C. §§ 6928(a) and (g). In my view, this language militates *against* the majority's conclusion that the United States is a "person" subject to civil penalties in a RCRA citizen suit. If Congress intended the United States to be a "person" subject to civil penalties, the reference to "any person, including the United States" should have appeared in sections 6928(a) and (g) just as it appears in the citizen suit provision. *See id.* at 604. Contrary to the majority's conclusion, the fairest reading of section 6972 in conjunction with sections 6928(a) and (g) and section 6903(15) is that the United States—including the DOE—is subject to citizen suits brought by states seeking declaratory enforcement orders and injunctive relief, but civil penalties cannot be imposed in such actions against the United States or the DOE.[4]

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[4] The exclusion of the United States from the list of "persons" subject to civil penalties seems entirely logical because such penalties assessed under the RCRA are payable "to the United States." *See* 42 U.S.C. § 6928(g); *cf. also Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 n. 25, 101 S.Ct. 2615, 2623 n. 25, 69 L.Ed.2d 435 (1981) (civil penalties assessed in Clean Water Act citizen suits are payable to the federal government). Thus, the civil

Because the majority opinion misreads the RCRA to broaden the scope of the DOE's potential exposure, I dissent from the majority's RCRA analysis insofar as the citizen suit provision is concerned.

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penalties authorized by the majority, if imposed by the district court, simply will be paid by the DOE to the federal treasury.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. OHIO, W.D.

No. C-1-86-0217

STATE OF OHIO, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF ENERGY,
ET AL., DEFENDANTS

March 18, 1988

ORDER DENYING MOTION TO DISMISS

SPIEGEL, District Judge.

This matter is before the Court for consideration of defendant's motion to dismiss and motion to stay (doc. 20). Plaintiff has responded in opposition to the motions (doc. 32).

On March 11, 1986, plaintiff State of Ohio filed this action for injunctive relief, damages, civil penalties and declaratory relief against the United States Department of Energy, the Secretary of Energy and their contractors at the Feed Materials Production Center (FMPC), NLO, Inc. (NLO), and NL Industries, Inc. (NL Industries). Plaintiff alleges that defendants have improperly disposed of hazardous wastes, have released radioactive mate-

rials into the air, water and soil, and have polluted surface water and ground water with chemical and radioactive contaminants. The State substantially bases its claims on the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund), 42 U.S.C. §§ 9601 *et seq.*, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. §§ 1251 *et seq.*, the Ohio Solid & Hazardous Waste Control Act, Ohio Rev. Code Ann. ch. 3734 (Baldwin 1982) and the Ohio Water Pollution Control Act, Ohio Rev. Code Ann. ch. 6111 (Baldwin 1982).

The DOE filed its motion to dismiss and motion to stay on November 7, 1986, seeking (1) to dismiss Count I of the Complaint (for the recovery of response costs under CERCLA); (2) a stay of Count II (for natural resources damages under CERCLA); (3) to dismiss Counts III through XVI (for injunctive relief and civil penalties under RCRA and the Ohio Solid & Hazardous Waste Control Act); and (4) to dismiss Counts XVII through XXVI (for injunctive relief an civil penalties under CWA and the Ohio Water Pollution Control Act). This motion came on for hearing on January 28, 1988. At that time, the parties informed the Court that Count I has been withdrawn and that they agree to stay Count II pending completion of a Remedial Investigation/Feasibility Study (RI/FS). Counts III-XVI and XVII-XXVI have been withdrawn to the extent they seek injunctive relief under the aforementioned Acts. Thus, only the claims for civil penalties are before the Court. The DOE moves to dismiss those claims pursuant to Rules 12(b)(1) and 12(b)(6), Fed.R.Civ.P., on grounds that the claims are barred

by the doctrine of sovereign immunity. Plaintiff argues that the government has waived its sovereign immunity with respect to these claims.

The issues to be determined are whether this Court has the authority to impose civil penalties on the Department of Energy and whether the State could recover such penalties.

I.

The United States may not be sued absent its consent. *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941). Waivers of immunity are strictly construed and are not "enlarged . . . beyond what the language [of the pertinent statutes] requires." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86, 103 S.Ct. 3274, 3277-78, 77 L.Ed.2d 938 (1983) (quoting *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686, 47 S.Ct. 289, 291, 71 L.Ed. 472 (1927)).

II.

Section 6001 of the RCRA provides in part that:

> [e]ach department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local *requirements*, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to

> enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.

42 U.S.C. § 6961 (emphasis added).

Section 6001 was enacted in its present form in response to the Supreme Court's decisions in *Hancock v. Train*, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed. 2d 555 (1976) and *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976). These cases held that the Clean Air Act and the Federal Water Pollution Control Act did not clearly and unambiguously demonstrate Congressional intent to subject federal facilities to state permit requirements. In refusing to expose federal installations to state control, the Court specifically distinguished substantive requirements respecting control and abatement of pollution from procedural (administrative and enforcement) requirements. *Hancock*, 426 U.S. at 183, 185, 96 S.Ct. at 2014, 2015; *State Water Resources Control Board*, 426 U.S. at 215, 96 S.Ct. at 2029.

Congress enacted the new RCRA three months after the Supreme Court announced *Hancock* and *State Water Resources Control Board*, and amended the Clean Air Act, the Clean Water Act and the Safe Drinking Water Act during the following year.[1]

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[1] The CAA and the SDWA amendments, enacted after the RCRA and before the CWA, have been held to contain ex-

In each environmental statute, Congress used language referring to "all" state requirements, both substantive and procedural.

III.

Although there is no reference to civil penalties in section 6001, plaintiff argues that the language subjecting each department to all federal and state "requirements" is sufficient to encompass civil penalties. Plaintiff submits that the parenthetical list following this language is not inclusive, but illustrative. Plaintiff also argues that "sanctions" includes civil penalties. In addition, the State asserts that RCRA § 7002 authorizes the assessment of civil penalties against federal facilities in the context of citizen suits. Section 7002(a) provides in pertinent part that:

> [e]xcept as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—
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> (1)(A) *against any person* (*including* (*a*) *the United States*, and (b) any other governmental instrumentality or agency . . .) who is alleged to be in violation of any permit, standard, regulation, condition, re-

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press waivers of sovereign immunity as to civil penalties. 42 U.S.C. § 7418(a); 42 U.S.C. § 300j-6(a); *State of Alabama ex rel. Graddick v. Veterans Administration*, 648 F.Supp. 1208 (M.D.Ala.1986); *State of Ohio ex rel. Celebrezze v. United States Dep't of the Air Force*, —— F.Supp. ——, No. C-2-86-0175 (S.D.Ohio Mar. 9, 1987) (unpublished). The CWA waives immunity to civil penalties only to the extent that they arise under Federal law or are imposed by a State or local court to enforce an order or the process of such court. 33 U.S.C. § 1323(a). The RCRA does not contain direct language reflecting either approach.

> quirement, prohibition, or order which has become effective pursuant to this chapter; or
>
> (B) *against any person, including the United States* and any other governmental instrumentality or agency . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. . . .
>
> * * * * *
>
> The district court shall have jurisdiction . . . to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both . . . as the case may be, and *to apply any appropriate civil penalties under section 6928(a) and (g) of this title.*

42 U.S.C. § 6972(a) (emphasis added).

Plaintiff also refers to the legislative history of the 1984 RCRA Amendments to support its contention that section 7002 renders the government liable for civil penalties. Senate Report No. 284, 98th Cong., 1st Sess. 44 (1983) states in part that:

> [t]he duty to compile and submit the inventory to the Administrator is a mandatory, nondiscretionary duty. Should an agency fail to carry out

> the inventory requirements, section 3015 requires the Administrator to compile the inventory. The Administrator's duty is also nondiscretionary. Either a noncomplying agency of [sic] the Administrator, if he fails to act, are [sic] subject to the citizen suit and penalty provisions of section 7002. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suit against 'any person, including the United States . . .'.

Plaintiff asserts that, although this report refers to an unrelated section of the RCRA, it reflects Congress' intent to authorize civil penalties under section 7002.

Defendant argues that because waivers of sovereign immunity must be strictly construed, courts may not imply such waivers from the plain language of section 6001. It asserts that the term "requirement" does not normally include penalties or injunctions, and that the specific inclusion of injunctions in section 6001 only makes the absence of civil penalties more significant. Defendant also states that post-hoc legislative history cannot describe the views of a previous Congress with any accuracy. Finally, defendant argues that even if "sanctions" may be interpreted to include civil penalties, under the plain language of section 6001 they may be imposed only to enforce an injunction.

With regard to section 7002, defendant states that it provides authority for imposition of any appropriate civil penalty against "any person" under RCRA §§ 3008(a) and (g). Defendant asserts that the definition of "person" in the RCRA does not include the United States. RCRA § 1004(15), 42 U.S.C. § 6903(15).

IV.

Few Courts have considered the issue of sovereign immunity from civil penalties in the context of the RCRA. In *Meyer v. United States Coast Guard*, 644 F.Supp. 221 (E.D.N.C. 1986), the language and legislative history of RCRA § 6001 were found inadequate to waive sovereign immunity for civil penalties. The *Meyer* court specifically relied on two cases which did not involve government immunity from civil penalties, *People of the State of Cal. v. Walters*, 751 F.2d 977 (9th Cir. 1984) (per curiam) and *State of Fla. Dep't of Envtl. Regulation v. Silvex Corp.*, 606 F. Supp. 159 (M.D.Fla. 1985). *Walters* has been cited as the leading case on waiver under section 6001. It specifically held that criminal sanctions are not a "requirement" within the meaning of section 6001, but are the means by which requirements are enforced. *Walters*, 751 F.2d at 978. These cases were cited in *Meyer* as support for a "restrictive" interpretation of the waiver of sovereign immunity in section 6001.

The court in *McClellan Ecological Seepage Situation v. Weinberger*, 655 F.Supp. 601 (E.D.Cal. 1986) (hereinafter *MESS*) found *Meyer* instructive, and likewise determined that section 6001 does not effectuate a waiver of immunity. The court stated that "RCRA § 6001 on its face does not provide clearly and succinctly for a waiver of sovereign immunity for civil penalties, and none will be implied." *MESS*, 655 F.Supp. at 603.

In *United States of America v. State of Washington*, C-87-291-AAM (E.D.Wash. Jan. 22, 1988), the court relied on *Walters*, *Meyer*, and *MESS* in concluding that RCRA § 6001 does not waive the government's immunity from state civil penalties. The

Washington court explicitly accepted the *Walters* distinction between "requirements" and the means by which requirements are enforced. *Washington*, slip op. at 4. The court further found that no waiver was evident on the face of the statute, and that none could be implied from its ambiguous legislative history. Accordingly, the court granted the government's motion for summary judgment.

Conversely, United States Magistrate Hornby has issued a "Recommended Decision on Defendant's Motion for Partial Summary Judgment," concluding that section 6001 permits the recovery of civil penalties by a state administrative agency against the federal government. *State of Maine v. Department of the Navy*, 86-211 P, (D.Me. Nov. 16, 1987) (unpublished). The district court has not yet ruled on the issue. The Magistrate found that "the plain language of the statute with the ordinary implications a reader would draw meets the Supreme Court's requirement that Congress plainly manifest its intent to waive sovereign immunity." *Maine*, slip op. at 11. Magistrate Hornby specifically noted that the parenthetical language in section 6001, beginning with "including," clearly does not constitute a complete list of waivers. *Id.* at 12. He also disagreed with the Ninth Circuit's distinction between requirements and enforcement devices, claiming that the creation of a sovereign immunity category of enforcement devices contradicts the Supreme Court's analysis in *Hancock v. Train*. Id. at 7 n. 5.

We conclude that the Magistrate's analysis of *Walters* and *Hancock* is correct. The *Hancock* court considered the permit requirement an enforcement device, characterizing it as procedural in nature. *Hancock*, 426 U.S. at 183, 96 S.Ct. at 2014. The court went on to distinguish between procedural and

substantive requirements, holding that Congress intended to subject federal facilities only to substantive state standards. In response to this determination, Congress amended the RCRA to include "all Federal, State, interstate, and local requirements, both substantive and procedural. . . ." RCRA § 6001, 42 U.S.C. § 6961. Despite this Congressional mandate, the Ninth Circuit Court of Appeals in *Walters* held that section 6001 does not waive sovereign immunity to state imposition of criminal sanctions because such sanctions are enforcement devices rather than a "substantive or procedural requirement." *Walters*, 751 F.2d at 978. We decline to follow the reasoning of *Walters* and its progeny.

The relevant language of section 6001 provides that each "agency . . . having jurisdiction over any solid waste management facility . . . shall be subject to, and comply with, all . . . state requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief). . . ." Other courts have concluded from the face of this legislation that it was not intended to waive sovereign immunity to civil penalties. *MESS*, 655 F.Supp. at 604; *Meyer*, 644 F.Supp. at 222-23. We cannot agree, particularly given the context of this section's amendment. Section 6001 was altered in response to the *Hancock* and *State Water Resources Control Board* decisions, which held that Congress did not waive immunity as to procedural (including enforcement) requirements. Congress could compel a different result only by expressly including state procedural requirements (and thereby enforcement devices) in the waiver provisions of the RCRA. The legislature elected to do so, making federal agencies subject to all

state requirements, both substantive and procedural. RCRA § 6001, 42 U.S.C. § 6961.

Had Congress intended only to reverse the results of *Hancock* and *State Water Resources Control Board*, it could have added parenthetical language waiving sovereign immunity as to state requirements for permits but leaving section 6001 intact in all other respects. Because it instead subjected federal agencies to *all* state requirements, the parenthetical language in the current version of section 6001 cannot constitute a complete list of waivers.[2] This conclusion is reinforced by the structure of the parenthetical list; it begins with the word "including" rather than with a word of limitation. Thus, Congress' failure to list civil penalties in the parenthetical cannot support the negative inference that it did not intend to waive the government's immunity to such penalties.[3]

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[2] Plaintiff cites the following examples of essential procedural requirements not contained in the parenthetical list: completion of manifests to identify hazardous waste being transported by truck (40 CFR 262.33, O.A.C. 3745-52-23), writing contingency plans to prepare hazardous waste facilities for fires, explosions, and other hazardous waste emergencies (40 C.F.R. 264.51, O.A.C. 3745-54-51), planning for safe closure of hazardous waste after use (40 CFR 264.112, O.A.C. 3745-55-12), and keeping an operating log to record locations of hazardous waste (40 CFR 264.73, O.A.C. 3745-54-73).

[3] Nor can the subsequent statement—"[n]either the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief"—support an inference that exemption exists as to everything else. *See Maine*, slip op. at 12 n. 7. Although we admit our analysis of the preceding language, such repetition does not mandate a different conclusion. The opposite

Based on the context in which section 6001 was amended by Congress, and the language of that amendment, the Court concludes that Congress intended to waive sovereign immunity to civil penalties under the RCRA.

V.

Plaintiff has pleaded federal violation of the Ohio Solid Waste Disposal Act, Ohio Rev.Code Ann. §§3734.01 *et seq.*, with particularity. If it can prove facts supporting these claims, it may recover. Accordingly, defendant's motion to dismiss under Rule 12(b)(6), Fed.R.Civ.P., must be denied. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976).

VI.

Section 313 of the Clean Water Act provides in pertinent part that:

> [e]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution

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result is illogical rather than simply repetitive. It requires that we do not assign to the words "all" and "including" their recognized meanings.

> in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever) (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. . . . No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and *the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.*

33 U.S.C. § 1323(a) (emphasis added).

Congress enacted the CWA in this form one year after the Supreme Court issued *Hancock* and *State Water Resources Control Board*. It was the last environmental statute to be amended in response to these decisions, and is the only act of the four to refer specifically to the United States' liability for civil penalties.

VII.

Plaintiff argues that federal agencies and officers are subject to state civil penalties because such penalties are "sanctions" within the meaning of the Act.

According to plaintiff, the section then modifies this broad waiver by limiting the United States' liability for civil penalties to those arising under Federal law or those imposed by a State or local court to enforce an order or the process of such court. CWA § 313, 33 U.S.C. § 1323. Ohio contends that the civil penalties imposed under the state-administered National Pollutant Discharge Elimination System (NPDES) arise under federal law because they were imposed for violations of a permit issued by the United States Environmental Protection Agency (EPA) pursuant to 33 U.S.C. § 1342 and transferred to Ohio Environmental Protection Agency administration. Finally, plaintiff argues that the citizen suit provision of the CWA authorizes civil penalties for violations of the Act.[4]

Defendant argues that civil penalties are not expressly included in the term "sanction," and that no such interpretation may be implied. The DOE further states that even if civil penalties are available

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[4] CWA § 505(a) provides in part that:

> [e]xcept as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) against *any person (including (i) the United States . . .)* who is alleged to be in violation of (A) an effluents standard or limitation under this Act . . .
>
> The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation . . . and *to apply any appropriate civil penalties under section 309(d) of this Act.* [33 U.S.C. 1319].

33 U.S.C. § 1365 (emphasis added).

Section 309(d) provides that any "person" to violates certain requirements of the CWA is subject to civil penalties. Defendant states that the defintion of "person" in the CWA does not include the United States. *See* CWA § 502(5), 33 U.S.C. § 1362(5).

for violation of federal law, the EPA's approval of a state program does not convert the penalty provisions of state law into federal law. In addition, defendant asserts that the citizen suit provision of the CWA does not authorize the assessment of civil penalties against the United States.

VIII.

The only case directly examining CWA § 313(a) for waiver of sovereign immunity is *MESS*, 655 F. Supp. 601 (E.D.Cal. 1986). The *MESS* court labeled CWA § 313(a) a "compilation of ambiguity," noting that the language of the Act seems to prohibit application of civil penalties under state or local laws that are exact duplicates of enforceable CWA penalty provisions. *MESS*, 655 F.Supp. at 604. The court called such a result an "absurdity," but nonetheless found that the plaintiff had not demonstrated waiver of sovereign immunity. *Id.* at 605. It is not clear from the *MESS* opinion whether the Court considered an argument that civil penalties imposed under the state-administered NPDES arise under federal law. We believe that this is the primary issue confronting this Court in terms of waiver of immunity under the CWA.

The National Pollutant Discharge Elimination System (NPDES) authorizes the Administrator of the EPA to issue a permit for the discharge of pollutants into navigable waters. 33 U.S.C. § 1342(a)(1). The Administrator's permit program is subject to the same terms, conditions and requirements as apply to a State permit program under this section. 33 U.S.C. § 1342(a)(3). A State may submit a proposed permit program to the Administrator, who will approve the program unless he or she determines that the

State lacks authority to administer it. 33 U.S.C. § 1342(b). Among other things, the State must have authority to abate violations of the permit or the permit program through imposition of civil and criminal penalties and other ways and means of enforcement. 33 U.S.C. § 1342(b)(1). If the State program is approved, the Federal permit program must be withdrawn. 33 U.S.C. § 1342(c)(1). The State program must then be administered in accordance with Federal guidelines. 33 U.S.C. § 1342(c)(2).

Defendant argues that once a state is authorized to administer its own NPDES permit program, the program is operated by the state under state, not federal, law. It asserts that the Administrator's approval of a state program does not convert the penalty provisions of state law into federal law. However, section 313(a) does not require such a conversion. Rather, it imposes liability on the United States for civil penalties "arising under" Federal law. The state program insures compliance with the pollution prevention standards defined by the Act. Compliance with a state permit is deemed compliance with the CWA. 33 U.S.C. § 1342(k). Under these circumstances, we find that civil penalties imposed under the state program "arise under Federal law." Accordingly, the Court concludes that Congress intended to waive sovereign immunity to civil penalties under the CWA.

IX.

Plaintiff has pleaded federal violation of the Ohio Water Pollution Control Act, Ohio Rev.Code Ann. ch. 6111, with particularity. If it can prove facts supporting these claims, it may recover. Accordingly, defendant's motion to dismiss the CWA claims under Rule 12(b)(6), Fed.R.Civ.P., must also be denied.

See Conley, 355 U.S. at 45-46, 78 S.Ct. at 101-102; *Westlake*, 537 F.2d at 858.

X.

The Court concludes that Congress intended to waive sovereign immunity to civil claims under both the RCRA and the CWA. The plaintiff has pleaded its state claims with sufficient particularity. Therefore, we find that this Court has the authority to impose civil penalties on the Department of Energy, and that, if violations are proven, the State may recover such penalties. Accordingly, it is Ordered that defendant's motion to dismiss is denied.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-3329

STATE OF OHIO; ANTHONY J. CELEBREZZE, JR., ATTORNEY GENERAL, PLAINTIFFS-APPELLEES

v.

U.S. DEPARTMENT OF ENERGY, DEFENDANT-APPELLANT

JOHN S. HERRINGTON, SECRETARY OF ENERGY; NLO, INC., NL INDUSTRIES, INC., DEFENDANTS

ORDER

[Filed Oct. 10, 1990]

Before: MARTIN, JONES and GUY, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-3329

STATE OF OHIO and ANTHONY J. CELEBREZZE, JR., Attorney General, PLAINTIFFS-APPELLEES

v.

U.S. DEPARTMENT OF ENERGY, DEFENDANT-APPELLANT

JOHN S. HERRINGTON, ET AL., DEFENDANTS

On Appeal from the United States District Court for the Southern District of Ohio

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Before: MARTIN, JONES and GUY, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the

judgment of the said district court in this case be and the same is hereby affirmed.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN, Clerk

/s/ Leonard Green
Clerk

Issued as Mandate: October 18, 1990

A True Copy.

Attest:

/s/ Valarie Fields
Deputy Clerk

APPENDIX E

STATUTORY PROVISIONS INVOLVED

1. Sections 313(a) and 505(a) of the Clean Water Act, 33 U.S.C. 1323(a), 1365(a) provides:

§ 1323. Federal facilities pollution control.

(a) Each department, agency, or instrumentality of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal * * * requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal dis-

trict court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with section 1441 *et seq.* of title 28. No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court. The President may exempt any effluent source of any department, agency, or instrumentality, in the executive branch from compliance with any such a [sic] requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption. In addition to any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regula-

tions exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.

Clean Water Act Section 505(a), 33 U.S.C. 1365 (a):

§ 1365. Citizen suits.

(a) Authorization; jurisdiction.

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the

Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

2. Sections 6001 and 7002(a) of RCRA, 42 U.S.C. 6961, 6972, provide:

§ 6961. Application of Federal, State, and local law to Federal facilities.

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of soild waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court, with respect to the enforcement of any such injunctive relief. The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropria-

tion unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemption from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

§ 6972. Citizen suits

(a) In general

Except as provided in subsection (b) or (c) of this section and section 1319(g)(6) of this title, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(2) against the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transpor-

tation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(3) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court for the District of Columbia. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under sections 6928(a) and (g) of this title.

3. Ohio Rev. Code Ann. § 3734.13(C), as amended 1985 Ohio Laws 2295, provides:

§ 3734.13 Enforcement orders; emergency orders; procedure upon violation.

* * * *

(C) If the director determines that any person is violating or has violated this chapter, a rule adopted thereunder, or a term or condition of a permit issued thereunder, the director may, without prior issuance of an order, request in writing that the attorney general bring a civil action for appropriate relief, including a temporary restraining order, preliminary or permanent injunction, and civil penalties in any court of competent jurisdiction. Such an action shall have precedence over all other cases. The court may impose upon the person a civil penalty of not more than ten thousand dollars for each day of each violation of this chapter, a rule adopted thereunder or a term or condition of a permit issued thereunder, which moneys shall be paid into the hazardous waste clean-up fund created in section 3734.28 of the Revised Code.

Any action under this section is a civil action, governed by the Rules of Civil Procedure and other rules of practice and procedure applicable to civil actions.

4. Ohio Rev. Code Ann. § 6111.09 (Anderson Supp. 1987) provides:

§ 6111.09 Penalty paid to state treasury; ~~removal of nonconforming product.~~

Any person who violates section 6111.07 of the Revised Code shall pay a civil penalty of not more than ten thousand dollars per day of violation. The attorney general, upon written request by the director of environmental protection, shall commence an action under this section against any person who violates section 6111.07 of the Revised Code. Any action under this section is a civil action, governed by the Rules of Civil Procedure and other rules of practice and procedure applicable to civil actions.

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